IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

QUARAII RASHARD BRUMFIELD,
Petitioner.

No. 2 CA-CR 2018-0216-PR
Filed October 25, 2018

Petition for Review from the Superior Court in Pima County
No. CR20074143001
The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Petitioner

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Quaraii Brumfield seeks review of the trial court's order summarily denying his untimely, of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Brumfield has not shown such abuse here.

¶2 In 2008, Brumfield pleaded guilty to three counts of attempted child molestation. The trial court suspended the imposition of sentence and placed him on concurrent, fifteen-year terms of probation. Those terms were extended in 2009 after Brumfield violated the terms of probation. After he again violated his probation terms, the court revoked probation in 2010, sentencing Brumfield to concurrent, 6.5-year prison terms for each count.

¶3 In 2017, Brumfield filed a notice of and petition for post-conviction relief, raising claims of newly discovered evidence, ineffective assistance of counsel, and actual innocence. His petition centered on his alleged recent discovery that he did not have chlamydia, and thus could not have transmitted it to one of the victims, and that his cousin had "admitted to [him] that he provided false statements to police about" witnessing Brumfield's conduct. He asserted that, had he been aware he did not have chlamydia and "[b]ut for" his cousin's "false statement to police, [he] would not have plead guilty." He also asserted counsel was ineffective in failing to discover in his medical records that he did not have chlamydia and that he was actually innocent.s

¶4 The trial court summarily denied relief. It concluded trial counsel could have discovered, "[t]hrough reasonable due diligence," medical records indicating Brumfield had not been diagnosed with chlamydia. It further found his cousin's purported recantation was "not material" because other witnesses "offered statements detailing the incidents," and Brumfield had admitted to police that he had committed sexual offenses against two of the victims. Thus, the court concluded,

Brumfield had not made colorable claims based on newly discovered evidence. The court also rejected Brumfield's related claim of ineffective assistance because it could not be raised in an untimely proceeding and, in any event, counsel could reasonably rely on Brumfield's belief that he had chlamydia. Finally, again noting Brumfield's incriminating statements to police, the court rejected his claim of actual innocence. This petition for review followed.

¶5 On review, Brumfield first asserts the trial court erred in rejecting his claim of newly discovered evidence that he did not have chlamydia and argues that he is entitled to an evidentiary hearing. To be entitled to an evidentiary hearing, Brumfield must have "alleged facts which, if true, would probably have changed" the outcome of his case. *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016) (emphasis omitted). To raise a colorable claim of newly discovered evidence pursuant to Rule 32.1(e), Brumfield must demonstrate that: (1) the evidence is, in fact, newly discovered; (2) he exercised due diligence in discovering and presenting the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issue involved; and (5) the evidence probably would change the verdict or sentence. *See* Ariz. R. Crim. P. 32.1(e); *State v. Serna*, 167 Ariz. 373, 374 (1991). And, "[e]vidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13 (App. 2000).

¶6 Brumfield concedes trial counsel could have discovered the evidence but asserts the lack of diligence "cannot be attributed to" him. But Brumfield has cited no authority suggesting we may disregard counsel's alleged lack of diligence when evaluating a claim of newly discovered evidence.[1] *See id.* And, even if we were to agree with Brumfield that counsel was required to question Brumfield's knowledge of his own medical condition, Brumfield is not permitted to raise a claim of ineffective assistance of counsel in this untimely proceeding. Ariz. R. Crim. P. 32.4(a)(2)(A), (C). Rule 32.1(e) does not contemplate a claim of newly discovered evidence of ineffective assistance of counsel, and is instead restricted to "newly discovered material facts . . . [that] probably would . . .

[1]Brumfield refers to an unpublished memorandum decision, but not only does that decision not support his argument, he has not complied with Rule 111(c)(3), Ariz. R. Sup. Ct., by "provid[ing] either a copy of the decision or a hyperlink to the decision where it may be obtained without charge."

change[] the verdict or sentence." *See Serna*, 167 Ariz. at 374 (describing five elements of successful newly discovered evidence claim).

¶7 Brumfield next asserts the trial court erred by determining his cousin's alleged recantation was not material. He contends that, to obtain relief under Rule 32.1(e), he need only demonstrate that he would not have pleaded guilty in the absence of his cousin's "support[]" of the charges against him. Again, no such claim is contemplated by Rule 32.1(e). And, insofar as Brumfield contends that, without his cousin's initial statement, he could have established "reasonable doubt as to his guilt," he does not develop this argument in any meaningful way, and we do not address it further.[2] *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (insufficient argument waives claim on review).

¶8 We grant review but deny relief.

[2]In any event, Brumfield has cited no authority permitting a pleading defendant to claim the state could not have convicted him of offenses he has admitted committing. A guilty plea generally precludes a claim of innocence. *Cf. State v. Norgard*, 92 Ariz. 313, 315 (1962) (characterizing as "frivolous" motion to withdraw from plea when "the only basis given . . . was that the defendant apparently changed his mind and claimed to be innocent"); *State v. McFord*, 125 Ariz. 377, 379 (App. 1980) (agreeing with trial court that "when a plea is knowingly and voluntarily entered with effective assistance of counsel, and when there is a factual basis for the plea, 'the foundation and purpose of plea bargaining would be undermined by allowing a party to later recant and request withdrawal of his guilty plea'"). And, by pleading guilty, Brumfield has waived all non-jurisdictional defects unrelated to the validity of his plea. *See State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008).